

***United States Court of Appeals
for the Second Circuit***



**PETITIONER'S
REPLY BRIEF**

ORIGINAL

77-4204

**United States Court of Appeals
For the Second Circuit**

CHI YIM WU

Petitioner,

-against-

IMMIGRATION AND NATURALIZATION SERVICE

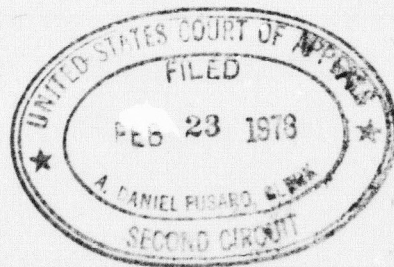
Respondent

PETITIONER'S REPLY BRIEF

FRIED, FRAGOMEN, DEL REY & O'ROURKE, P.C.

Attorneys for Petitioner
515 Madison Avenue
New York, New York 10022
(212) 688-8555

By: Martin L. Rothstein, Esq.
William A. Gerber, Esq.
Of Counsel



Dick Bailey Printers, 290 Richmond Ave., Staten Island, N.Y. 10302
Tel.: (212) 447-5358

TABLE OF CONTENTS

Table of Cases and Authorities	i
Preliminary Statement	1
ARGUMENT	
POINT I - Three Recent Decisions Lend Support to Petitioner's Legal Position, and Repudiate the Views Expressed by the Respondent's Brief Herein.	1
POINT II - The References in the Government's Brief to Non-Hearing Record Material are Improper and Should Be Stricken.	7
Appendix - <u>In Matter of Carranza-Lara, A21 305 467, 15 I&N</u> <u>Dec. _____, (decided November 17, 1977, stayed</u> <u>November 21, 1977, Stay vacated January 12, 1978)</u>	

TABLE OF CASES

Navia-Duran v. Immigration and Naturalization Service,
F2nd _____ (1st Cir. No. 77-1160, decided
December 30, 1977) 4,5

Wong Chung Che v. Immigration and Naturalization Service,
565 F2d 166 (1st Cir. 1977).....4,5,6

ADMINISTRATIVE DECISIONS

In Matter of Carranza-Lara, A21-305-467, 15 I & N Dec. _____,
(Decided November 17, 1977, stayed November 21, 1977,
stay vacated January 12, 1978) 2,3,4,9

STATUTES AND REGULATIONS

Section 106(a) Immigration and Nationality Act, 8 USC 1105(a)..... 7

Section 203(a)(6) Immigration and Nationality Act, 8 USC
1153 (a)(6)..... 9

Section 204(l) Immigration and Nationality Act, 8 USC 1154(b).... 9

Section 291 Immigration and Nationality Act, 8 USC 1361..... 6

8 CFR 242.15 7

8 CFR 242.16(b)..... 3

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X

CHI YIM WU,	:	
Petitioner,	:	
-against-	:	77-4204
IMMIGRATION & NATURALIZATION	:	
SERVICE,	:	
Respondent.	:	

-----X

PETITIONER'S REPLY BRIEF

This brief is being submitted in response to the
brief submitted by the respondent herein.

I.

THREE RECENT DECISIONS LEND SUPPORT TO
PETITIONER'S LEGAL POSITION, AND REPUDIATE
THE VIEWS EXPRESSED BY THE RESPONDENT'S
BRIEF HEREIN

Essentially, the respondent contends that petitioner
was, in fact, afforded a fair and proper deportation hear-
ing consistent with the elements of due process of law,
and that, in any event "since alienage is not an admission
of criminal guilt, an alien has no constitutional right to
remain silent during a hearing" (brief for Respondent P.14).

Recent decisions, however, published after the filing of petitioner's brief herein, have eroded the logical basis for the Government's contentions.

In Matter of Carranza-Lara, A21 305 467, 15 INS ____, (decided Nov. 17, 1977, stayed Nov. 21, 1977, stay vacated Jan. 12, 1978), the Board of Immigration Appeals passed squarely upon the issue of the right of an alien to plead the Fifth Amendment in deportation proceedings, and reached a decision directly opposed to that being advanced by the United States Attorney's Office herein. In Carranza-Lara, in which an alien charged with entry without inspection (essentially the same charge involved herein) was directed by the Immigration Judge to answer the charges made against him, the Board of Immigration Appeals held:

"We agree with the respondent that he had the right to invoke his constitutional privilege against self-incrimination under the Fifth Amendment in this proceeding. Valeros v. INS, 387 F.2d 921 (7 Cir. 1967). However, the immigration judge had a duty to have the respondent plead to allegations in the Order to Show Cause. See Laqui v. INS, 422 F.2d 807 (7 Cir. 1970); 8 C.F.R. 242.16(b). Nevertheless, in view of the nature of the charge, entry without inspection, it was improper for the immigration judge to demand that the respondent answer the first two allegations in the Order to Show Cause after the respondent had stated for the record that he refused to answer on the ground that his answer might tend to incriminate him. Moreover, the Service was never given an opportunity to present its case. Therefore, we will remand the case for a new hearing in order to permit the Service to present evidence of the respondent's alienage."

[The entire decision is reproduced as an appendix to this reply brief].

We submit that the situation at bar is directly analagous to situation in Carranza-Lara except for two points: 1) Here, the Immigration Judge went far beyond taking respondent's plea to the allegations in the Order to Show Cause, as contemplated in 8 C.F.R. 242(16)(b), and engaged in a free-wheeling interrogation;¹⁾ 2) Respondent here did not correctly invoke his Fifth Amendment privilege, but stated "I don't know" when the Immigration Judge examined him as to his country of citizenship.

1) The Immigration Judge complied with 8 CFR 242(16)(b) when at the outset, respondent's counsel was asked to admit to the allegations in the Order to Show Cause and declined to do so. Having in effect received a plea of "not guilty," the Immigration Judge immediately instructed the Government Trial Attorney to "proceed" (See A3). When counsel then indicated that the respondent would remain mute, the Judge reentered the picture in order to establish his deportability asking a series of questions which can only be described as cross-examination, e.g.,: "Yes, but which part of China are you a citizen of, Nationalist China, or the Mainland of China" all, while respondent's counsel pleaded for the right to confer with his client (See A7)

When the Immigration Judge persisted, respondent blurted out that he had "jumped ship," (a fact having nothing to do with citizenship) and then remained silent. Only after counsel requested a recess and the Judge replied:

"Let him answer this question, and then I'll give you a recess" (A6)

did the respondent admit facts on which his deportability could be predicated.²⁾

We respectfully submit that neither of these distinctions compels a result different than that reached by the Board of Immigration Appeals in Carranza-Lara, supra. The failure to properly invoke the Fifth Amendment privilege in the case at bar resulted from the Immigration Judge's gross abuse of discretion in making petitioner's ability to confer with his attorney contingent upon a complete answer to the questions being asked of him. The broader nature of the Judge's interrogation should be regarded as an even broader encroachment of petitioner's rights, fully justifying a remand.

The two additional decisions upon which we rely are Wong Chung Che v. INS, 565 F.2d 166 (1st Cir. 1977) and Navia-Duran v. INS, _____ F.2d _____, (1st Cir. No. 77-1160, decided December 30, 1977).

2) We, of course, have no way of knowing whether this crucial colloquy between Immigration Judge was translated for respondent by the interpreter. However, whether translated or not, its fundamental unfairness rendered the concept of a fair hearing meaningless.

In Wong Chung Che, supra, the First Circuit remanded to the Board of Immigration Appeals for an evidentiary hearing upon motion, made in deportation hearings but not properly considered, that the evidence used against an alien was obtained as a result of an illegal search. The facts concerning the seizure had been set forth in affidavits supporting "motion to suppress". In so holding, the Court indicated that evidence obtained through an illegal search could not be used to establish deportability. (See 565 F.2d at 169).

In Navia-Duran, supra, the First Circuit applied the same rationale to a statement obtained from an alien by INS officers under inherently coercive conditions. In Navia-Duran, the alien's suppression motion was accompanied by affidavits as to the facts surrounding her interrogation, and she remained silent at the deportation hearing upon the advice of counsel. In view of her silence, the INS established the alien's deportability by introduction of a signed statement which she had given, while in custody, and her motion was summarily denied. In remanding the case, the Court stated:

"For the appellant here argues that the use of her statement was a violation of her due process rights as guaranteed by the Fifth Amendment both because the statement was involuntary and because the INS regulation requires that a person who is arrested without a warrant must be advised of certain rights quite apart from the Miranda rule. [8 CFR 287.3]. We have found these arguments persuasive". [Slip Opinion at P.9]

5a.

The Court also held:

"Although 8 U.S.C. 1361 (1970) states that the alien's failure to show the time, place, and manner of entry results in a presumption of illegal presence in this country, that presumption does not operate until the INS has made out a prima facie case. [Slip Opinion at P.15].

The above-cited decisions serve to reinforce our position that the petitioner's rights were violated, and that the appropriate remedy would be a remand for a de novo hearing. The decisions underscore the essential validity of a pre-hearing suppression motion supported by detailed affidavit, and the importance of the Fifth Amendment at the hearing itself, both as an absolute constitutional right per se, and as an appropriate vehicle for assuring a hearing on an alien's suppression motion filed to vindicate previously violated Fourth and Fifth Amendment rights.³⁾

Furthermore, the Navia-Duran decision fully supports our contention that admissions improperly extracted, whether in a pre-hearing interrogation or at the hearing itself by the Immigration Judge, should be suppressed. It also supports our position that the presumption contained in 8 USC 1361, relied on so heavily by the respondent, cannot become operative until the Government has established alienage through clear, unequivocal and legally obtained evidence.

3) If there were no right to remain silent, any suppression motion would immediately be defeated at hearing by the Government's compelling an alien to admit his alienage, and obviating the need for introducing the evidence alleged to be tainted.

II.

THE REFERENCES IN THE GOVERNMENT'S BRIEF
TO NON-HEARING RECORD MATERIAL ARE IMPROPER,
AND SHOULD BE STRICKEN

This is a petition for review of a final Order of Deportation made by the Board of Immigration Appeals, affirming an order made by an Immigration Judge after a deportation hearing. 8 USC 1105(a) [Immigration & Nationality Act, Sec. 106(a)] upon which the jurisdiction of this Court is predicated provides that:

"the petition shall be determined solely upon the administrative record upon which the deportation order is based ..."

In 8 CFR 242.15, the contents of the record in deportation hearings is delineated as follows:

"the hearing before the special inquiry officer, including the testimony, exhibits, applications and requests, the special inquiry officers' decisions [Immigration Judge] and all written orders, motions, appeals, briefs and other papers filed in the proceedings shall constitute the record in the case"

Notwithstanding the explicit nature of the statute and regulations, the Government has chosen to include in the so-called "administrative record" and in its brief, references to material from the petitioner's INS file which admittedly was "received after the deportation hearing," "and not part of the record upon which Judge Schonfeld rested his finding." [See Brief for Respondent at P.9].

In particular, the documentation referred to consists of a Sixth Preference Visa Petition predicated upon two labor certifications, filed with the New York District of the Service after the deportation hearing had been completed [AR20-37]. The Government repeatedly refers to this non-record material⁴⁾ in two ways:

1) by frequent referral to the petitioner's "illegal employment" in the United States, as an adverse factor; 2) as a reason not to remand for a new hearing, i.e., the petitioner has admitted his alienage in his visa petition which could presumably be introduced at any subsequent hearing. (See e.g., brief for respondent Pps. 9, 10, 17, 17).

It is respectfully submitted that the respondent's reliance upon non-record material is unfair, prejudicial, and inappropriate. Hence, all such references should be ordered stricken.

4) Although this documentation was apparently filed as the "Administrative Record", petitioner was never furnished with a copy of such record. In any event, it is manifestly inappropriate for the INS to place a ribbon upon an alien's entire file and send it to Court as the "Administrative Record" of a deportation hearing, when, in fact, all such material was not before the administrative tribunal.

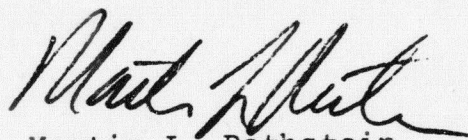
We also wish to note that the Government's reliance upon this non-record material which it has chosen to utilize is misplaced. Far from being an adverse factor, an approved labor certification and Sixth Preference Petition by an American employer establish that an alien is a skilled worker whose skills are needed in the United States because there are no qualified United States workers available to fill the position occupied by the alien. [See 8 U.S.C. 1153(a)(6), and 1154(b)]. In fact, the approval of a labor certification and Sixth Preference Petition is often considered as a favorable factor by Immigration Judges, justifying an exercise of discretion in an alien's behalf.

Additionally, it is absurd for the respondent to argue that no purpose would be served by a hearing de novo because of the admissions of alienage contained in the non-record documentation. Such argument is tantamount to a prosecutor urging an appellate court not to order a new trial upon appeal of a denied suppression motion because other conclusive evidence of guilt is in the possession of the prosecution. In fact, one need look no farther than the decision of the Board of Immigration Appeals in Carranza-Lara, supra, in which a new hearing was ordered after the alien's hearing confession was invalidated, notwithstanding the existence of a visa petition which was part of the record, which petition could conclusively establish alienage.

In short, if respondent was not afforded a hearing consistent with the requirements due process of law, he is entitled to a hearing de novo, and the respondent's resort to non-record material should not be permitted to defeat this right.

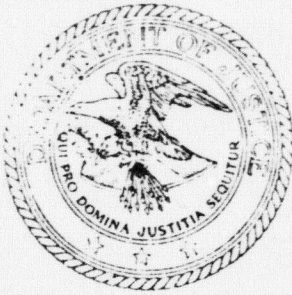
Respectfully submitted,

FRIED, FRAGOMEN, DEL REY & O'ROURKE, P.C.
515 Madison Ave.
New York, N.Y. 10022

A handwritten signature in dark ink, appearing to read "Martin L. Rothstein". The signature is fluid and cursive, with the first name "Martin" and last name "Rothstein" clearly distinguishable.

By: Martin L. Rothstein

DATED: New York, N.Y.
February 1978



APPENDIX

United States Department of Justice

Board of Immigration Appeals

Washington, D.C. 20530

NOV 17 1977

File: A21 305 467 - Brownsville

In re: JESUS CARRANZA-LARA

IN DEPORTATION PROCEEDINGS

CERTIFICATION

ON BEHALF OF RESPONDENT: Laurier B. McDonald, Esq.
P. O. Box 54
Edinburg, Texas 78539

ON BEHALF OF I&N SERVICE: Pete Magaro
Trial Attorney

CHARGE:

Order: Sec. 241(a)(2), I&N Act (8 U.S.C. 1251)
(a)(2)) - Entered without inspection

APPLICATION: Termination of proceedings

The immigration judge has certified to us for review his decision of August 16, 1977, pursuant to our order of April 7, 1977 remanding the record for further proceedings. ^{1/} In his decision the immigration judge reinstated his decision, dated December 1, 1976, finding the respondent deportable as charged and granting him the privilege of voluntary departure. The record will be remanded.

^{1/} Our order remanding the record was motivated by the court's order in Silva v. Levi, No. 76-C4268 (N.D. Ill.) of March 22, 1977, as has been subsequently amended, and the passage of the Immigration and Nationality Act Amendment of 1976, P.L. 94-571, 90 Stat. 2703. At the remanded hearing on July 13, 1977, the respondent, through counsel, stated that he does not come within the purview of Silva v. Levi.

The respondent is a 36-year-old native and citizen of Mexico who last entered the United States at an unknown time in an unknown manner. On June 3, 1976 his United States citizen wife filed a visa petition in his behalf. Before an interview could be held in connection with that petition, the respondent was arrested at his residence on July 10, 1976. He was issued an Order to Show Cause the following day and an immigration judge found him deportable under section 241(a)(2) of the Immigration and Nationality Act on December 1, 1976.

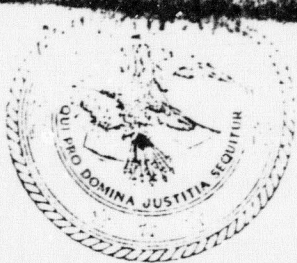
Although the respondent claimed the privilege against self-incrimination under the Fifth Amendment at his deportation hearing, the immigration judge directed him to answer to the first two allegations in the Order to Show Cause. The respondent then admitted that he was not a citizen of the United States and that he was a native and citizen of Mexico.

We agree with the respondent that he had the right to invoke his constitutional privilege against self-incrimination under the Fifth Amendment in this proceeding. Valeros v. INS, 387 F.2d 921 (7 Cir. 1967). However, the immigration judge had a duty to have the respondent plead to allegations in the Order to Show Cause. See Laqui v. INS, 422 F.2d 807 (7 Cir. 1970); 8 C.F.R. 242.16(b). Nevertheless, in view of the nature of the charge, entry without inspection, it was improper for the immigration judge to demand that the respondent answer the first two allegations in the Order to Show Cause after the respondent had stated for the record that he refused to answer on the ground that his answer might tend to incriminate him. Moreover, the Service was never given an opportunity to present its case. Therefore, we will remand the case for a new hearing in order to permit the Service to present evidence of the respondent's alienage.

We note, in addition, that the respondent's suppression motion is without merit because no evidence was introduced as a result of the respondent's arrest. The physical presence of an alien is not "evidence" that may be suppressed as the "fruit of the poisonous tree." See Delara-Esquivel v. INS, 551 F.2d 300 (2 Cir. 1976); Guzman-Flores v. INS, 496 F.2d 1245 (7 Cir. 1974).

ORDER; The record is remanded to the immigration judge for further proceedings consistent with the foregoing opinion and the entry of a new decision.

Chairman



United States Department of Justice

Board of Immigration Appeals

Washington, D.C. 20530

JAN 12 1978

File: A21 305 467 - Brownsville

In re: JESUS CARRANZA-LARA

IN DEPORTATION PROCEEDINGS

CERTIFICATION

ON BEHALF OF RESPONDENT: Laurier B. McDonald, Esq.
P.O. Box 51
Edinburg, Texas 78539

ON BEHALF OF I&N SERVICE: Pete Magaro, Esq.
Trial Attorney

Execution of the order of the Board dated November 17, 1977, was deferred for 30 days on November 21, 1977 and was deferred for an additional 30 days on December 22, 1977, for the filing of a motion by the Service, and if motion filed within that time, until the Board considered and rendered a decision on the motion.

The Board is now advised that the Service will not file a motion for reconsideration.

IT IS ORDERED that our orders of November 21, 1977 and December 22, 1977, staying execution of our order of November 17, 1977, be and are hereby vacated.

Chairman

FRIED

AFFIDAVIT OF PERSONAL SERVICE

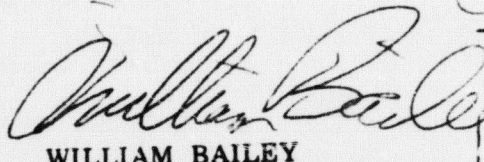
STATE OF NEW YORK
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 21 day of Feb., 1978 at No. 1 St. Andrews Pl., NYC

deponent served the within Brief
upon Thomas Belote, U.S. Attorneys, 4th Floor

the A Respondent herein, by delivering 3 true
copy(ies) thereof to him personally. Deponent knew the person so
served to be the person mentioned and described in said papers as the
Respondent therein.

Sworn to before me this
21 day of Feb. 1978.



WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945

Qualified in Richmond County
Commission Expires March 30, 1978


Edward Bailey

